United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-2251

United States Court of Appeals

For the Second Circuit.

STEPHEN D. MADDALONI,

Plaintiff-Appellant,

v.

LONG ISLAND RAIL ROAD, W. L. SCHLAGER, JR., LOCAL 808, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, M. GREENE and JOHN MAHONEY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT

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PL. 3-8756.

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ISSUES

The issues presented by this appeal are:

1. Were the requisite elements of due process lacking at plaintiff's arbitration hearing held pursuant to the Railway Labor Act 45 U.S.C.A. 151 et seq.

2. If due process was lacking at such arbitration hearing, can action be maintained against RAILROAD to set aside the award of the arbitrator, even if RAILROAD was not the immediate cause of such lack of due process.

FACTS

This is an appeal by plaintiff from a judgment [261] of the United States District Court for the Eastern District of New York dismissing plaintiff's action and granting summary judgment to defendant, LONG ISLAND RAILROAD (RAILROAD). The action was brought by plaintiff against RAILROAD, and its president; and LOCAL 808, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN and HELPERS OF AMERICA (LOCAL) and two of the LOCAL's officers [4-10], pursuant to the provisions of the Railway Labor Act 45 U.S.C.A. 151, et seq.

Plaintiff was employed by RAILROAD as a policeman from July 23, 1970 to October 31, 1972. On May 18, 1972, plaintiff, while on duty, reported to RAILROAD that he was ill and was going home. RAILROAD, which maintains that it has the right to investigate allegations of sickness reported by its employees, telephoned plaintiff's home and was advised that he was not at home. Based on plaintiff's not being at home, RAILROAD commenced disciplinary action against plaintiff consisting of a company trial [71-108] and which resulted in his being dismissed.

LOCAL, which represented plaintiff at the

company trial which the RAILROAD held, appealed the matter to the President of RAILROAD and that appeal was rejected [109]. Thereafter, LOCAL submitted the matter to an Arbitrator, pursuant to the provisions of the Railway Labor Act, 45 U.S.C.A. 151 et seq. After a delay of over one year, the matter was heard by the Arbitrator on May 31, 1973 and after further delay, was decided by the Arbitrator in favor of RAILROAD and forwarded to plaintiff on September 18, 1973, [116-122].

Thereafter, plaintiff commenced this action in the Eastern District [4-10] for the purpose of setting aside the decision of the Arbitrator, restoring plaintiff to his position as a RAILROAD police officer and awarding plaintiff back pay and other incidental financial damages which he suffered by reason of being wrongfully discharged.

The theory of plaintiff's action in the District Court was that he had been denied due process at the arbitration because he was not apprised of and had no knowledge of the hearing date and was thus not present and because the Union represented him and acted without his authority in submitting the matter

to arbitration.

Defendant, RAILROAD, made a motion for summary judgment on behalf of defendants [17-150]. A hearing was ordered [162-163] and held before Judge Dooling on defendants' motion on May 14, 1974 [164-253].

Judge Dooling found as a result of that hearing [82] that plaintiff "was given notice of the hearing but that he was not adequately counseled in terms of his letter of February 27, 1973." (The February 27, 1973 [255] letter instructed the Union that plaintiff wanted to be present at all hearings and that he wanted advance copies of all briefs and memorandums pertaining to his defense so that he might add anything he believes necessary to his defense.) The Court further found that defendant, RAILROAD, was "in the clear" and if there is any case it "is a breach of duty between plaintiff and the Local."

Judge Dooling then granted RAILROAD's motion to the extent of dismissing the action against defendant, RAILROAD, but continuing the action as to defendant, LOCAL, and its two officers named in the complaint [259-260]. Judgment was signed and entered May 16, 1974, [261].

This appeal is brought to set aside the judgment of the District Court dismissing defendant, RAILROAD.

POINT I

DUE PROCESS WAS NOT AFFORDED PLAINTIFF AT ARBITRATION HEARING

It is axiomatic that what constitutes due process will depend upon circumstances in each case, Application of People of the State of New York, 138 F. Supp. 661 (SDNY 1956), Allain v. National R. Adjustment Board, 120 F. Supp. 453 (ND Ill. E.D. 1953), Affirmed 212 F 2d 32. In the case at bar, plaintiff contends that he was not notified of the time and place of the hearing and that his case was not presented by LOCAL as his representative, in accordance with his instructions.

Local Acted Contrary To Instructions And Without Authority

There can be no doubt of the express instruction contained in the letters dated February 27, 1973 [255], and March 14, 1973 [254], addressed to defendant, LOCAL, and sent via certified mail. The February 27, 1973 letter reads as follows:

> "In our conversation this date, you stated that a neutral board had been set up on my behalf. Due to the fact that the decision of this neutral will effect my

entire life, I hereby inform you that I wish to be present at any and all hearings.

I also request that any and all briefs and all memorandums pertaining to my defense be made in duplicate and a copy sent to me, so that I may add anything that may be beneficial to my case.

I request that you notify me at least two days prior to any hearings of the exact time and location of such hearings so that I can make any necessary travel arrangements.

I also request that if at all possible a meeting be arranged at your convenience so that you and I may set up the best possible defense.

Of course it is understood that any travel arrangements to any location for myself will be paid at my own expense.

Thanking you in advance for your full cooperation with the above requests, I remain"

The letter of March 14, 1973 reads as follows:

"As I have not heard from you concerning my letter of February 27, 1973 I find it necessary to write to you again. I ask you to please contact me immediately in compliance to my requests in the above mentioned letter.

I am sending carbon copies of these letters to John so that he may assist us in any way possible.

Again thanking you in advance, I remain,"

The import of these letters is more than merely requesting to be present at the arbitration. It is issuing specific instructions to LOCAL regarding the preparation and handling of plaintiff's appeal. The Court in reviewing this matter did find that plaintiff was "not adequately consulted in the terms of his letter of February 27, 1973." As a matter of fact, LOCAL did not follow plaintiff's instructions, and in presenting his case, acted without his authority.

The Courts have consistently held that a grievant at an arbitration proceeding, pursuant to the Railway Labor Act 45 U.S.C.A. 151 et seq., has the right not only to be present at that arbitration but to participate in the arbitration. Allain v. National R. Adjustment Board, 120 F. Supp. 153, affirmed 212 F. 2d 32; Ellerd v. Southern Pacific Railroad Co. (U.S.C.A. 7th 1957) 241 F. 2d 545. The "Railway Labor Act reserves to the aggrieved employee the right to participate in all stages of the adjustment process. . . . ." Slagley v. Illinois Central Railroad Company, 397 F. 2d 546 (U.S.C.A. 7th 1968) at p. 551.

The mere fact that the Court below continued the action against LOCAL is ample evidence of the fact

that LOCAL did not represent plaintiff adequately and in accordance with plaintiff's instructions regarding his presence at the hearing and his participation. This is sufficient under the cases cited to find due process lacking.

Notice To Grievant
Not Adequately Given

It is plaintiff's contention that he did not have notice of the time, date and place of the arbitration and this lack of notice constitutes a lack of due process.

At the May 14, 1974 hearing, Judge Dooling found that plaintiff did have notice of the arbitration. [245]. It is plaintiff's contention that Judge Dooling's finding that plaintiff had notice was not supported by the direct testimony and evidence introduced at that hearing or in support of RAILROAD's motion to dismiss.

At the hearing plaintiff testified [219-220 and 254-255], that he specifically requested on two occasions, in letters sent certified mail, that he be notified of the time, place and date of the arbitration. Plaintiff also testified that he never received any notice of the arbitration or its postponement [220-221].

Defendant, Martin Greene, testified that he dictated notification of the arbitration to plaintiff by telephone, at the same time he dictated notification to another grievant, one Victor Lucente, who had similarly had an arbitration proceeding pending against defendant, RAILROAD, on the same day. Mr. Greene further testified that he told his secretary to send notice of the arbitration postponement to Mr. Maddaloni via certified mail [205]. Miss Entress, Mr. Greene's secretary, to whom he allegedly dictated the notices, testified [200] that she did not send the notice to Mr. Maddaloni via certified mail. When asked what she did after typing and signing the notice to plaintiff, Miss Entress said [198] "I put it in the mail I guess."

It is obvious from a fair reading of the testimony regarding the manner in which the notices of arbitration and adjournment were allegedly prepared and sent out, that there is only a presumption that in the normal course of business such a notice would have gone out. There is no specific memory of the defendant's witnesses or any other evidence that the notices actually went into the mail. This is countered by plaintiff's direct testimony that he did not receive the letters or

any other notification of the arbitration. Plaintiff's contention that he did not receive the notices [220-221], is reinforced by the inference created by the fact that Mr. Lucente, whose arbitrations were scheduled at the same time as Mr. Maddaloni's, received notice of the initial arbitration and the adjournment of that arbitration via certified mail [202].

In addition to the foregoing, there is the September 17, 1973 letter [150] which was sent by plaintiff to secretary of LOCAL at a time when plaintiff believed he had won the arbitration. This letter, which was deemed in evidence by the Court at the May 14, 1974 hearing [242-243], clearly shows that plaintiff had no knowledge of the date and place of the arbitration. The Court below considered this letter [243-244] and interpreted it to mean that plaintiff did not know of the time and place of the arbitration; however, the Court then apparently disregarded this letter in making its decision.

From the foregoing it can be seen that the evidence and testimony introduced at the May 14, 1974 hearing does not support the finding that plaintiff had no knowledge of the time and place of the arbitration hearing.

POINT II

ARBITRATION HELD IN VIOLATION OF REQUIREMENTS OF DUE PROCESS IS INVALID

The essence of the Court's decision dismissing the complaint against defendant, RAILROAD, is that if due process is lacking it is the fault of defendant, LOCAL, and not the fault of defendant, RAILROAD, and defendant, RAILROAD, has done all that it is obligated to do under the law.

However, the law as enunciated in the case of Ellerd v. Southern Pacific Railroad Co. (U.S.C.A. 7th 1957) 241 F. 2d 545 is that regardless of whether the lack of due process was caused by railroad or union, if due process was lacking at the arbitration hearing held pursuant to the Railway Labor Act, 45 U.S.C.A. 151 et seq., the decision of the arbitrator must be set aside. The Ellerd case, which has been cited with approval by the United States Supreme Court, Union Pacific R. Co. v. Price, 360 U.S. 601 (p. 616) and by this Circuit, Ferro v. Railway Express Agency Inc., (1961) 296 F. 2d 847 (p. 853) held at page 545 that:

> "The sole feature that leads us to reverse is the all decisive question of whether plaintiff has been deprived

> of due process of law, by action of the Union. If he has, the award is subject to review. If he has not, it is final and cannot be reviewed."

If, as plaintiff contends here, he was deprived of due process at the arbitration hearing because he was not given the right to participate in the hearing, the Ellerd case teaches us that the award of the arbitrator must be set aside.

CONCLUSION

Decision of District Court dismissing defendant, RAILROAD, should be reversed.

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New York, New York
November 14, 1974

UNITES STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT

376—Affidavit of Service By Mail , The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

STEPHEN D. MADDALONI,
Plaintiff-Appellant,

v.

LONG ISLAND RAILROAD, W. L. SCHLAGER, JR., LOCAL 808, Teamsters, et al.
Defendants-Appellees.

AFFIDAVIT OF SERVICE BY MAIL

State of New York, County of New York, ss.:

N Harold Dudash, being duly sworn deposes and says that he is agent for Alfred F. Koller, Jr. the attorney for the above named Plaintiff-Appellant herein. That he is over 21 years of age, is not a party to the action and resides at 2530 Young Avenue, Bronx, N.Y.

That on the 14th day of November, 19 74, he served the within Appendix and Brief for Appellant

UPON:

George M. Onken, Attorey for Defendants-Appellees, Long Island Railroad and George Jamaica Station , Jamaica, N.Y. & Walter L. Schlager, Jr.

Haskell L. Wolf, Attorney for Defendants-Appellees, Local 808, I.B.T., M. Greene & 62-17 Northern Boulevard, Woodside, N.Y. 11377 John Mahoney,

upon the attorneys for the parties and at the addresses as specified below

by depositing three true copies of each

to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at

90 Church Street, New York, New York

directed to the said attorneys for the parties as listed above at the addresses aforementioned,

that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 14th day of November, 19 74

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4507705
Qualified in Delaware County
Commission Expires March 30, 1975

N Harold Dudash